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ABSTRACT

This guide combines legal and mental health resources to help solve problems of child custody and visitation. It is divided into the following sections: (1) Interprofessional Dialogue; (2) Law for Mental Health Professionals; (3) Psychology for Lawyers; (4) Trial Techniques and Preparation; (5) Visitation; and (6) Panel Discussion. (Author/JLL)

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Divorce, children, attorneys and clinicians

Combined Use of Legal and Mental Health Resources to Solve Problems of Child Custody and Visitation

CG 011297

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Presented by
The Interdisciplinary Committee
on Child Custody
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Continuing Legal Education in
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Anthony Kisley, M. D.
Nancy Nelson, M. D.
Susan Wendall Whicher, J. D.
James Tulloch, M. D.

Program

When:	**Saturday, May 22, 1976**
Where:	**Phipps Tennis House** 3300 Belcaro Drive, Denver
8:00 - 9:00	**Registration**
9:00	**Philosophical Overview** Gary May, M.D.
9:10	**Interprofessional Dialogue** Gary May, M.D. and Katherine Tamblyn, LL. B.
9:30	**Split Session** **Law for Mental Health Professionals** Confidentiality, Hearsay, Burden of Proof; Domestic Relations Statute; Divorce vs. Dissolution Frank Bryant, J.D. **Psychology for Lawyers** Developmental Concepts; Grief and Loss; The Psychological Problems Behind the Complaints Lawyers Hear Everyday Jean Van DePolder, M.D.
10:30	**Break**
10:45	**Mixed Small Groups:** Identification and Discussion of Problems Raised in 9:30 Sessions
12:00	**Lunch** – Luncheon will be provided on the grounds
1:30	**Trial Techniques and Preparation** William P. Waggoner, LL. B. and Fred Miller, M.D.
2:15	**Visitation** James Tulloch, M.D. and Frank McGuane, J.D.
3:00	**Panel Discussion** Consultants: Guardian ad Litem – Bruce Flossic, J.D. Negotiation and Settlement – Katherine Tamblyn, LL. B. Follow-up Therapy – Leona Kopetski, M.S.W. Children in the Courtroom – Gary May, M.D. Modification of Permanent Orders – William P. Waggoner, LL. B.
4:15	**Wine and Talk**
5:30	**End of Program**

INTRODUCTION

J. Gary May, M.D.

Director of Adolescent Psychiatry
University of Colorado Medical Center

Private Practice: Adult, Adolescent and
Child Psychiatry
Lakewood, Colorado

Fellow, American Psychiatric Association

Counselor, American Academy of Child Psychiatry

Consultant, National Committee for Prevention
of Child Abuse, Chicago

Consultant, Bethesda Mental Health Center

INTRODUCTION

A. Lawyers, shrinks, and custody

1. The strange tension (and fascination) which exists between the legal and the mental health professions.

   a. Advocate vs. advocate
   b. Advocate vs. helper (rescuer)
   c. Advocate vs. "truth" ("truth" in a scientific, objective and complex sense)

2. The shared experience of attorneys and mental health professionals in their concern, frustration and sense of need to find a better way to work together in child custody. This shared experience led to the development of Interdisciplinary Committee on Child Custody.

3. The history of the Interdisciplinary Committee on Child Custody.

   a. Formation. The committee developed out of the experience of a seminar held in February of 1975 at the University of Colorado Medical Center. The committee formed as a direct result of that experience.

   b. The members of the Interdisciplinary Committee are listed on the attached sheet.

   c. Format. The format has been to meet at least once a month and discuss in a forthright and open manner the issues of child custody. The process has been lubricated with a bit of ethanol and a great deal of stimulating conversation. The chairperson has been Ms. Leona Kopetski who has gently but firmly moved this group rapidly ahead.

   d. Accomplishments. There was developed under the direction of Ms. Susan Wendall Whicher, a Cambridge style debate on child custody presented at the Colorado Bar Association in the Fall of 1975 and at the Colorado Psychiatric Society Vail Meetings in January of 1976. The debate is currently being prepared for videotaping in conjunction with the National Center for the Prevention of Child Abuse, Denver, Colorado.

      The group has worked together on many important issues and has begun to put together a document on the effect of age and development on visitation rights. It also organized the seminar that you are now attending. In process is also a book on child custody being prepared by the members of the committee.

B. The Custody Issue From A Mental Health Vantage Point.

1. Major Concern - "The Child"

2. Premise - Divorce is always disruptive to the child and therefore the child is always the victim.

3. Problem - The question of which doctrine:

   a. The best interest of the child
   b. The least detrimental alternative

4. Problem - Does one seek to protect the interest of the child or to protect the interest of the parent?

5. Problem - How does one, as a mental health person, express difficult, complex developmental considerations in a way which can be readily understood even by the opposing attorney who may be trying not to understand (at least sometimes it would so appear).

C. Some Sample Questions From Mental Health Disciplines For Consideration By The Members Of The Bar.

1. Why does it appear that the members of the bar prefer simplistic psychological approaches to dealing with the complexity of situations?

2. Why is there so little recognition on the part of attorneys of the role depression plays in divorce for both adults involved and the children and the need for vigorous follow-up care in most divorce situations?

3. Why do attorneys object to our discussion of what people tell us about their conversations and their impressions? Don't the archaic rules of confidentiality and admissibility of evidence markedly interfere with your getting the full picture upon which a judicial decision should be based?

4. How can attorneys get in a fight with one another and expect to learn anything out of that process?

5. Is the child in legal terms, a chattel?

6. Why all the ritual of the courtroom? Why not allow the professional witness to sit down with the judge and the interested parties and to have an opportunity to talk and fully communicate in a setting which is designed more for communication than for advocacy?

7. Just whose agent are we as an expert witness?
   ---Are we an extension of the court?
   ---Are we a witness who's expected to testify solely on behalf of those who pay us?
   ---Are we ultimately an agent of the "truth" and the "right"?

INTERDISCIPLINARY COMMITTEE ON CHILD CUSTODY

Frank Bryant
Attorney

Gary May, M.D.
Child Psychiatrist

Roger Cadol, M.D.
Pediatrician

Brian Hersch, M.D.
Psychiatrist

Frederick M. Miller, M.D.
Adult Psychiatrist

Claire Purcell, Ph.D.
Clinical Psychologist

Jean VanDePolder, M.D.
Child Psychiatrist

Nancy Nelson, M.D.
Pediatrician

Marilee Reimer
Clinical Social Worker

Wendy Whicher
Attorney

Leona Kopetski
Social Worker

Bruce Flossic
Attorney

Frank McGuane
Attorney

Katherine Ann Tamblyn
Attorney

William P. Waggoner
Attorney

Anthony Kisley, M.D.
Child Psychiatrist

James Tullock, M.D.
Child Psychiatrist

INTERPROFESSIONAL DIALOGUE

Katherine Tamblyn

* * * * * * * * *

Feder & Morris, P.C.
Denver, Colorado

B. A. University of Colorado
LL. B. University of Colorado

Member of American Bar Association
Member of Colorado Bar Association

INTERPROFESSIONAL DIALOGUE

Katherine Tamblyn

A. Do's and Dont's for the Medical Witness prepared by American Medical Association.

B. Joint Medico-Legal Plan for Screening Professional Liability Cases.

C. Interprofessional Code, prepared by Colorado Medical Society - Colorado Bar Association.

D. Selected Bibliography.

LAW DEPARTMENT
AMERICAN MEDICAL ASSOCIATION

"DO'S" AND "DONT'S" FOR THE MEDICAL WITNESS

The obligation of the physician to his patient may often extend to furnishing medical evidence in order to assist the patient in securing his legal rights. Physicians may also be called upon from time to time to examine persons who are not their patients for the purpose of obtaining a medical opinion affecting legal rights.

Since medical testimony is a crucial element in most litigation, the physician has an important role in the administration of justice. He should fulfill this role in a truly professional spirit, without fear or hesitation.

The physician who has adequate preparation for testifying, who testifies frankly, and who keeps within the limits of his professional competence has nothing to fear from the experience of being an expert witness. The most important precaution against difficulties in this role is for the physician to have thorough advance consultation with the attorney who calls him as a witness. In addition, the following list of "do's" and "dont's" will serve as a useful guide to proper conduct in the courtroom.

1. Do take the role of the medical witness seriously. The courtroom is a place in which practical men are engaged in the serious work of endeavoring to administer justice. The role of the medical witness is a key one in this endeavor.
2. Don't agree to or accept compensation for your services contingent upon the outcome of litigation. This practice is unethical and its disclosure would be apt to destroy the value of your testimony.
3. Do insist on preparation for your testimony in consultation with the attorney for the party who called you as a witness. He should advise you on what to

expect on cross-examination. You have a right to consult with the party and his attorney about the case, so don't be embarrassed if asked about such consultation.

4. Don't act as an advocate or partisan in the trial of the case. If the attorney for the party who calls you as a witness needs the advice or guidance of a doctor during the trial, let him employ another doctor. Disclosure of partisanship of a witness strongly tends to discredit his testimony.
5. Do be as thorough as is reasonably necessary under the circumstances in examining a party in preparation for trial. Exhaustion of all possible tests and procedures may not be required, but be prepared to justify any omissions.
6. Don't exaggerate. Any attempt to puff up your qualifications or to elaborate the extent of the examination you have made is apt to be exposed, to your embarrassment.
7. Do inform the attorney for the party who called you as a witness of all unfavorable information developed by your examination of the party, as well as the favorable information.
8. Don't try to bluff. If you don't know the answer to a question, don't guess. If you guess wrong, you may be falling into a trap.
9. Do be frank about financial arrangements with the party who called you as a witness, with respect to your compensation for both treatment given and services in connection with the litigation.
10. Don't regard it as an admission of ignorance to indicate that your opinion is not absolutely conclusive or that you don't know the answer to a particular question. Honesty may frequently require testimony of this nature.
11. Do answer all questions honestly and frankly. Any display of embarrassment or reluctance to answer will tend to discredit your testimony.

12. Don't use technical terminology which will not be understood by the jury, the attorneys, or the judge. If technical terms are unavoidable, explain them the best you can in the language of the layman.
13. Do be willing to disagree with so-called authorities if you are convinced that they are wrong. If you have sound reasons for disagreement, the contrary opinion of authorities will not necessarily discredit you.
14. Don't be smug. A jury is quite likely to react adversely to an attitude of this nature. A modest attitude on the part of a witness is apt to elicit a more favorable response. Leave it to the attorney to bring out your special qualifications.
15. Do be courteous no matter what the provocation. If a cross-examining attorney is discourteous to you, this is apt to win sympathy for you from the jury, provided that you don't descend to the same level.
16. Don't lose your temper. If a cross-examining attorney can provoke you to a display of anger or sarcasm, he has already substantially succeeded in discrediting your testimony.
17. Do pause briefly before answering a question asked you on cross-examination, to give the other attorney an opportunity to object to the question if he so desires. Taking a moment for deliberation before answering a question does not indicate uncertainty or embarrassment.
18. Don't allow yourself to be forced into a flat "yes" or "no" answer if a qualified answer is required. You have a right to explain or qualify your answer if that is necessary for a truthful answer.

JOINT MEDICO-LEGAL PLAN FOR SCREENING PROFESSIONAL LIABILITY CASES.

The Plan provides for panels composed of a minimum of three attorneys and three health care professionals to confidentially screen malpractice allegations submitted by attorneys against physicians, chiropractors, dentists, hospitals, health care facilities and their agents and employees, by consent of the parties. Parties may consent under Colorado Rules of Civil Procedure 109 to have the panel's disposition be binding. Hearing shall be within 45 days, conducted by attorneys for the parties, and will not be bound by formal rules of evidence. Panel is permitted to determine that evidence submitted is insufficient to render decision on the merits or return a tie vote, thereby releasing the parties from any consent to be bound. Panel is to determine by a majority secret vote whether reasonable probability exists that there is a claim for breach of professional duty and that claimant was injured thereby. Panel shall not find quantum of damage. If verdict for claimant, then appropriate professional society will cooperate in procuring expert witnesses. If verdict for respondent, then claimant's attorney shall refrain from filing court action unless personally convinced that strong and overriding reasons compel it. Parties may petition for reconsideration.

INTERPROFESSIONAL CODE

Colorado Medical Society — Colorado Bar Association

Foreword

The cause of good interprofessional relations should be well served by this code jointly developed by committees of the Colorado Medical Society and the Colorado Bar Association. The code is intended to be an instrument for better understanding of the problems existing between attorneys and physicians with reference to medical testimony. For those with years of experience in either profession, portions of the code may seem elementary. An occasional reminder, however, is never unimportant when it relates to fundamentals. More significant is the long-range purpose of the code: to prepare the new practitioner of either law or of medicine for matters in interprofessional relations of which he would be almost entirely unaware until he encountered them as problems in his practice. Forewarned, the practitioner may be able to avoid the problems altogether.

This Interprofessional Code constitutes the further recognition that with the great developments in the science and art of both medicine and law, it is inevitable that the physician and the attorney are drawn into steadily increasing association, as the law calls with increasing frequency upon medicine for its scientific knowledge and for its evaluation of facts so that the rights of individuals and of the government may be appropriately determined before various tribunals.

Each of the professions has the duty to develop an enlightened and tolerant understanding of the other. Each profession is vitally essential to the very preservation of society. The aims of the two professions are essentially parallel in their services to society, and this necessitates a full understanding at all times and full cooperation when that is called for.

It is an obligation which each profession owes to the other in the best interests of the public as well as in the best interests of the separate reputations of the two professions. Each must keep in mind the differences in the capacities and characteristics of the practitioner of both professions, and that while law and medicine may each be termed a science, each is an inexact science; and such inexactness is and always will be accented by the human limitations of its practitioners.

General Principles

Doctors of medicine and attorneys at law, as members of two professions possessing a close personal relationship with those they serve, have established principles of ethics applicable to the traditions and requirements of their respective callings.

The physician has responsibility for the care of the individual, in health as in disease. He must minister to his patient's needs to the best of his ability and in accordance with the high precepts of the Hippocratic oath.

The attorney is an officer of the court, sworn to support the Constitution of the United States and of the state or states in which he is admitted to practice. As is the physician, he also is pledged to maintain the confidence and to preserve inviolate the secrets of his client. He will not reject, from any consideration personal to himself, the cause of the defenseless or oppressed, nor delay any man's cause for lucre or malice.

Interprofessional Relations

Each profession is obligated by its own stature to respect and honor the calling of the other. Neither the fact nor the appearance of incompetence, corruption, dishonesty, or unethical conduct on the part of individual members of either profession can be tolerated. It follows then that each profession must vigorously support within its own ranks, as well as in the ranks of the other, those ethical concepts which each has found necessary in the public good. One who has chosen to be a physician or an attorney and has been found competent to be such by appropriate authorities, is vested with high responsibilities and privileges to enable him to serve the public with honor, with dignity, and with effectiveness.

1. The Attending Physician and His Patient

In situations where a patient's legal rights are at stake, the patient's physician should promptly furnish the patient's attorney with the medical facts and data pertinent to the case. The physician should accept the further responsibility of explaining such facts in such a manner that the attorney understands them and can determine their relationship to his client's cause. There should be complete cooperation between the physician and the attorney, each assuming his proper responsibility.

It is for the physician to determine the actuality or probability of fact pertaining to his patient's condition. It is for the attorney to determine how and under what circumstances such facts are to be appropriately presented.

Because of the large number of occasions when medical facts are intricate and difficult to understand, the physician should always provide the attorney with a written summary of them for his study. The physician should carefully preserve his own original records, although with express consent of his patient permitting their physical inspection by, or making a copy of relevant portions available to, his patient's attorney.

A physician should never advise on the amount of damages a patient should

seek to recover. The proper province of his professional advice is the extent, degree, or percentage of illness, injury, disability, or similar judgments based upon his professional knowledge of the case. He is not expected to understand technical rules of legal liability, of evidence, or of trial techniques. The latter are the exclusive province of the attorney.

2. The Attorney and His Client

It is part of the attorney's oath on his admission to the bar of this state that he will not counsel or maintain any suit or proceeding which shall appear to him to be unjust, or any defense, except such as he believes to be honestly debatable under the law of the land. He will employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth and honor and will never seek to mislead the judge or jury by any artifice or false statement of law or fact.

In discharge of that oath, it becomes the attorney's responsibility to marshal the facts and to obtain professional and other opinion which, in his judgment, are necessary for his client's case and in a manner consistent with his oath and the ethics of his profession.

It is important that the physician understand that legal proceedings in this country are conducted under what is known as the "adversary system." Under that system the attorney occupies a dual position. He is not alone an officer of the court but also the single-minded advocate for his client. He does not and cannot properly represent both sides to a dispute.

This system has developed in recognition of the truth demonstrated countless times that justice can usually be satisfactorily accomplished if the two or more contestants can present their points of view to some neutral third person who can weigh the opposing claims. Such claims are usually presented in the form of testimony which is offered in question and answer form. The judge of a court, the jury, or the officer presiding before an administrative tribunal is the referee who weighs the opposing points of view and the conflicts in testimony. In a sense the judge or administrative officer much more nearly approximates the physician in objectivity. The physician well knows, however, that in some situations it is also possible for medical men to vary honestly and sincerely in their physical findings, their treatment, and their evaluation of illness or injury.

3. Conferences

The physician and the attorney should always confer relative to the common problems presented in a particular case. Such conferences should be arranged in advance of a court or other hearing at the mutual convenience of each, in full appreciation that to each profession, time is of the utmost importance. No physician and no attorney should be required to spend unnecessary time in arranging or attending such a conference. The attorney who knows and understands the progress of his client's case, the conflict, if any, of its medical aspects, and the probability of settlement or trial should determine the necessity of a conference. The physician shall feel obligated to point out anything which he believes will be helpful in presenting the patient's case as well as the weaknesses in the opposing medical theories or testimony.

It is unfair to the patient-client, the physician, and the cause of justice to present a medical witness who has not first conferred with the attorney and who, therefore, may lack a full appreciation of the significance to the case of the particular evidence he is being asked to give. It is equally obvious that the attorney is less able to represent the full interests of his client where he has not had the advantage of full conferences with the physician in advance of presenting the case.

4. Reports to Attorneys

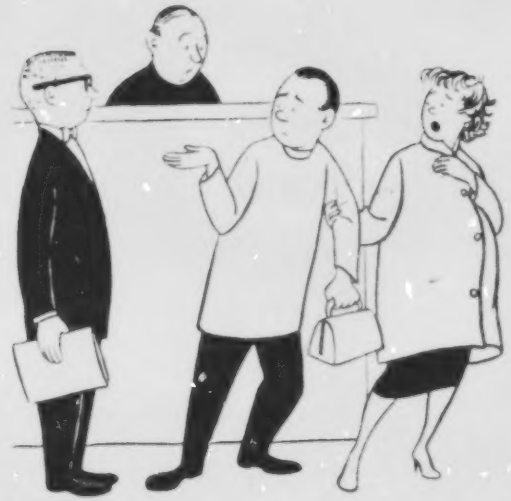
Physicians must appreciate that promptness in providing a patient's attorney with such information as may be available is of importance to the patient's legal rights. Many matters can be settled out of court to the mutual satisfaction of the parties involved. Undue delays in providing medical reports, bearing on a patient's legal rights, may prejudice the patient's opportunity, either as to settlement or disposal of the problem, and thus create possible further expense, worry, and even the loss of important testimony. Witnesses may die or facts become obscure as the time elapses.

As a minimum a physician's reports to his patient's attorney should include the following:

a. History as related by patient
b. Examination
c. Diagnosis
d. Treatment
e. Progress and prognosis

5. The Physician and Court Arrangements

It is the physician's obligation to be in court at the time requested. Timing is not only important for the orderly and advantageous presentation of the patient-client's case, but also for the convenience of the Court, other witnesses, the jury, the attorneys and other litigants. Courts and the attorneys must appreciate, however, that the physician has continuing and often unpredictable responsibilities to his patients. It must therefore be anticipated that at times courtroom procedure must give way to humanitarian considerations and the physician be permitted to testify "out of turn" or at another time. Courts and attorneys should undertake in every way to determine when and approximately how long the doctor of medicine will be needed in court. The doctor should be given as much advance notice as is reasonably possible, so that he can arrange his professional affairs accordingly.



When an emergency arises which calls for the services of a physician witness, judges and attorneys should promptly release such witness or postpone his appearance until the emergency has first been cared for.

6. The Attending Physician on the Witness Stand

The attending physician is a witness. As such he should never assume the role of the advocate. His patient is represented by an attorney who serves in that capacity. The counsel should not engage in examination of the physician as a hostile witness but as a provider of facts. The physician should show respect and consideration to the court and to the attorneys. Such also is the obligation of courts and attorneys to the physician.

If a physician believes that an attorney is omitting an important point in the course of presenting the case or that he is underestimating the importance of medical testimony which is being offered by the other side, he should tell the attorney so, preferably in writing.

7. The Attending Physician and His Charges for Services in Connection with Litigation

The medical profession has long accepted its responsibility to serve the health of the people without regard to race, religion, rank, or ability to pay.

But when the financial circumstances of the patient justify, the physician is entitled to reasonable compensation, as are others who provide such an individual with personal services or commodities. "Reasonable compensation" should include consideration of time spent by the physician in conferences, preparation of required or requested reports, travel costs, and court or other appearances. The attorney must do his full part in explaining that fact to his client.

It is proper and not unusual for an attorney to represent on a contingent fee basis a client who is not in a position to pay a per diem fee irrespective of the

outcome of the case and the attorney may acquire a lien upon the proceeds of the action. The medical profession neither has, nor seeks, any similar arrangement. The charges of a physician should not in any way be based upon a percentage of the patient's financial recovery. Any other practice might lead to a charge that the physician witness had an interest for being partial in his testimony.

8. The Attorney and His Direct Payment of Medical Fees

An attorney under his canons of ethics cannot stir up strife or litigation, and neither can he reward those who may persuade others to seek his service. He cannot "maintain" a suit or other proceeding. This standard presents every practicing attorney with difficult questions. Is he permitted, for example, to advance costs of litigation on behalf of his client? He may do so ethically where such advances constitute a charge to the client, and their collectibility is not contingent upon the outcome of the case. Such advances may be made by the attorney only with the understanding that he is to be reimbursed by his client.

It should be remembered that an attorney, in seeking the services of a physician in connection with a medical-legal matter, acts only as an agent for the client-patient, and incurs no legal obligation on his own behalf for the services of the physician. Nevertheless, professional courtesy on the part of the attorney requires that he exert his best efforts to insure that the client pays for such medical services with reasonable promptness. The attorney, at the time of settlement of a claim in behalf of his client, should, if possible, take steps to make certain that any unpaid medical charges due from his client are paid at that time.

9. Cooperation by Attorney to Assure Physician Payment

Misunderstandings between the two professions sometimes arise in those court cases or administrative proceedings in which it appears that the attorney protects his own fee without making any corresponding effort on behalf of the physician whose treatment in advance of the litigation and whose advice and testimony during the course of it are essential.

There are cases in which the attorney does not advance the fee for the physician's testimony, either because the amount is beyond his means or because he has no reasonable expectation of reimbursement by his client and is therefore not ethically warranted in making such advance.

Still another complication is presented when a physician takes care of a patient who asserts that his injury or illness arose out of or during the course of employment. It may ultimately be determined by an administrative body or a court that the injury did not arise out of employment. In such situation there will be no workmen's compensation award and the physician may remain unpaid. The attorney may then bring civil action and make a recovery with or without the testimony of the original treating physician. Or the physician may have prepared opinion evidence which was for some reason not acceptable to the patient or to his attorney and which, despite the time required and the careful preparation by the physician, may not have been used. In still other cases the testimony of the physician may have been ready, but the case may be settled out of court.

In any of the above situations and in others not here enumerated, the physician may have no protection for his earned professional fee, although it may have been included in the financial settlement. The attorney should, as a matter of fairness and interprofessional courtesy, do everything reasonably possible to assure payment of the services rendered by another professional man in a matter in which he is concerned. It has been held "professionally reprehensible" for an attorney to make a settlement of a case without providing for the physician's fee after he had made such an agreement with the examining physician witness with the client's approval.

10. Expert Testimony

The attorney should understand that in a very real sense, and one recognized by law, every physician is relatively "expert" in the field of medical testimony. The thoroughness and high quality of his training entitles him to this status as does his unlimited license. There is another degree of expertness recognized alike by courts and the profession which comes with specialized training and experience in a particular branch of medical science. It is in this latter sense that the term "medical expert" is more commonly understood and used.

An expert medical witness may or may not have treated the patient. He may or may not have examined the patient. The testimony of an expert must in part depend, then, on the facts of his relationship to the particular patient. His testimony, if he has not treated the patient, cannot be expected to be the same as if he had treated the patient "in the nakedness of his distress." Expert testimony will be still more limited if the physician, even though an acknowledged expert, has never examined the patient but has been limited to X-rays, observations, the reports of other physicians, or to hypothetical questions.

The attorney should take into account the difference between these situations and should not expect a medical expert to offer opinion evidence which exceeds the factual relationship of such expert to the patient, or which exceeds the facts contained within hypothetical questions put to him as the basis for his opinion.

11. Subpoenaed Expert

There are situations in which the attorney subpoenas the medical expert, either because a physician has been uncooperative or the attorney has thought

him so, or the physician has said, for example, that he does not wish to testify, or that he has no opinion. This presents complications from the standpoint of the physician. There is no question of the obligation of the physician to answer to a subpoena like any other citizen, except where grave emergency prevents his doing so. An emergency can never be a matter of mere convenience to the physician. It must always involve the genuine professional needs of a patient, and the physician takes the risk of convincing the Court that the emergency was of sufficient gravity to justify his ignoring the order of the Court.

The most obvious complications presented by a subpoena are: first, it is unlikely to take the demands of the physician's practice or his professional convenience into account; second, the physician is frequently not given enough time to prepare to respond to a subpoena; third, the compensation which accompanies a subpoena is nominal and does not reflect the reasonable value of the professional services involved in preparing or offering court testimony, or the time taken away from a physician's practice.

A physician subpoenaed as a medical expert cannot reasonably be held to special study, review of the authorities and medical literature, or to other specialized preparation in such circumstances.

No medical expert can be compelled to form an opinion, although he may be required to state the substance of his observations if he observed the patient. If he does not have a professionally adequate basis for an opinion as to a particular litigant whom he did not observe, he cannot be compelled to offer an opinion before a court or administrative body. If he has an opinion, he is obliged to state it.

If an attorney is insistent that a medical expert offer an opinion under these circumstances, the physician should be careful to state for the record that he has been subpoenaed, that he has not observed the patient, if such is the case, and that he has an insufficient basis upon which to form a professional opinion.

When a physician who has not observed a particular individual is subpoenaed as a medical expert, he will be confronted with the problem of the hypothetical question. If he can answer that question, he must do so. If he cannot answer it without special study or the question does not contain sufficient facts upon which to form an answer, he should so state.

21

12. Statements by Physicians to Both Sides

Attorneys are under ethical obligations first, not to handle both sides of a case, and second, not to deal with the parties to the other or adverse side except through the latter's attorney. The principle of adverse interests is not always well understood by the physician who is trained to think only in terms of patient interests. The result is that in some situations physicians may offer observations or opinions to both sides in a particular proceeding or lawsuit or may submit to interviews by attorneys for both parties, and that variations in their opinions may result which can be embarrassing and difficult to explain at a later time.

It is self-evident that a physician's integrity and judgment are among his most precious assets, and that neither should ever be "purchased." On the other hand, when a physician has been asked to offer his testimony on behalf of a patient or as an expert on behalf of a particular claimant, he should not needlessly complicate the case by making himself available to representatives of the other side or by offering apparently inconsistent viewpoints to two or more parties or their attorneys.

When a physician who has agreed to offer testimony on a case is approached by attorneys or other representatives for other parties with adverse interest, he should be frank about his prior commitment, notify the attorney for the party for whom he has agreed to testify, and thereafter be guided by the advice of the latter's attorney.

13. Ethical Limits of Medical Testimony

It is hard to set down in words the proper limits of medical testimony. If a physician has treated a patient on whose behalf he is offering testimony, he must offer the facts of his diagnosis, his treatment, and his prognosis honestly and simply. He should not indulge in speculation unless the case unavoidably requires such indulgence, and in such situation he must clearly label his own testimony as speculative or his "best estimate" or "best judgment."

Under no circumstances is a medical witness justified in suppressing medical evidence or in "taking sides" as such. First, such an attitude goes to the very credibility and usefulness of the testimony. Second, it is an unwarranted usurpation of part of the attorney's function.

If the physician is testifying as an expert, he should offer no opinion beyond the facts of the case or which is not otherwise in the court record or which goes beyond his personal knowledge or runs counter to his professional training and judgment. Violation of these fundamentals is not excusable by claiming that an attorney forced him into the making of an improper statement. His professional judgment and his own conscience must mark the limits of his testimony, including his opinions.

14. Efforts by Attorneys to Influence Medical Testimony

It is improper for an attorney to seek to color the professional opinion of the physician. He may properly point out the kind of medical evidence he needs to establish his case and the reasons for it, but this does not excuse him for trying to force or shape the physician's testimony. It must be remembered that any improperly presented medical testimony is almost always a bilateral product and one which is professionally unworthy of both the physician and the attorney.

As is well stated in Canon 15 of Legal Ethics: "The office of attorney does not permit, much less does it demand of him for any client, violation of law or any matter of fraud or chicane. He must obey his own conscience and not that of his client."

9

22

Finally, no ethical attorney is justified in abusing, badgering, or browbeating any witness, including a physician, whether it be one he called or a witness for the other side. Such actions are beneath the dignity of the attorney and are equally in violation of the dignity of the physician. Established rules of evidence give ample opportunity for testing the competence or credibility of a medical witness and make unnecessary and unjustifiable a resort to any of the above devices on the part of the cross-examining attorney. The same holds of examination of a physician who is in fact, or who is believed to be unfriendly to a particular viewpoint and is therefore examined as a "hostile witness."

No judge or other presiding official should tolerate such tactics, but where they do not act promptly, the physician should inquire of the person conducting the hearing whether he is required to submit to such treatment. Rarely will an administrator or judge fail to restore the hearing to a proper level after such a request is made.

15. The Problem of Conflicting Medical Evidence

One of the most common criticisms of medical testimony arises from conflicts between the testimony of two or more physicians with reference to the same case. Physicians are themselves critical of this situation under some circumstances. It is an extremely troublesome matter and one which may be partially solved by the observance of several principles, largely within the control of each of the professions.

The first is that an attorney can reduce the area of misunderstanding out of which conflicting testimony frequently comes by thorough preparation of his case, by a careful use of words, and by a carefully worked out purpose in having certain testimony offered. The second is that the physician can and should explain that medicine is as much an art as it is a science; that in many situations alternative treatments are available, any one of which may be appropriate; that judgment values are not exact but at best fall within rather substantial ranges; that certain risks attend a given procedure; that some cases will not have a successful outcome;

23

that many diagnoses are limited by the subjectivity of the symptoms and are complicated by the mental outlook of patients; and finally, that diagonsis and treatment must both be evaluated as of the time they occurred rather than in the light of a later day.

16. Choice of Language by Medical Witness

A medical witness testifying before an administrative body, such as an industrial commission, may ordinarily use technical language with relative freedom and confidence. The reason for this is that such bodies become relatively expert in the understanding of his medical vocabulary. That is true in varying measure of judges. It is not true, however, of a jury. It is possible for medical testimony to be so worded technically that its meaning is entirely lost upon a jury or is so completely misunderstood that the jury finds differently than it would if it had known the true import of the testimony.

When this situation occurs, it may be the responsibility of either or both the physician and the attorney. To make his professional testimony clear, both for the record and for physicians and attorneys on the other side, a medical witness should first express his findings and opinion in medical terms. He should then translate those terms as accurately as possible into language intelligible to the court, attorneys, and the jury. He should also put into intelligible language the effect of particular injuries. The latter is frequently easier than the technical statement of a diagnosis or of the treatment rendered.

The medical witness should remember that his testimony is not intended to impress or edify, but to explain. If it does not help explain and does not clarify the issues of a particular case, it has failed in the sense that it was not useful to the determination of the case.

17. Proper Use of Professional Associations

10.

When an attorney is of the opinion that another attorney in the case or a medical witness has acted improperly or has offered improper testimony, he should first seek to remedy the matter during the course of the hearing or litigation itself. Failing that, and if he continues to be of the opinion that a genuine wrong has been done, he should refer the case objectively, and without indulgence in personalties, to the professional organization of which either the attorney or the physician is a member.

In like manner, a physician, if he is satisfied as a matter of conscience and professional judgment that an attorney has exceeded the limits of propriety in his handling of medical witnesses or in his efforts to introduce improper medical testimony, should report his opinion to the bar association to such effect. He also has the clear obligation of reporting to the appropriate medical organizations one of his own profession who has, in his opinion, acted with apparent impropriety in the course of appearing as a witness.

The making of such a report either against a member of one's own profession or against the member of another profession is one of great delicacy and seriousness. Professional reputation is the most precious and at the same time the most fragile asset of any professional man. Subjecting it to question must be done with fairness, candor, and without rancor, and in the excercise of sound judgment and conscience.

By the same token, merely because of the gravity of the step, no member of either profession should abstain from reporting what he believes a substantial misconduct. At least as much harm can be done from such abstention as from making a groundless charge.

24

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UNIFORM DISSOLUTION OF MARRIAGE ACT

In the beginning, the Courts of England were greatly under the influence of the Catholic Church. Divorce was originally impossible and gradually became only difficult. Until 1972 in the United States it was nearly universal law that a divorce was granted to one spouse against the other, upon a finding of fault that was nearly criminal in nature. Until that time, the grounds for divorce in Colorado were adultery, desertion, impotence, mental or physical cruelty, non-support by the husband, habitual drunkenness or drug addiction, conviction of a felony, insanity, and living apart under order of Court for a period of three consecutive years. Under that statute, the degree of wrong could be used as a factor in the awarding or denial of alimony or property, and was highly relevant in the decisions concerning children.

In 1971 the General Assembly of Colorado enacted the Uniform Dissolution of Marriage Act, which was prepared by a division of the American Bar Association. In the first year following its introduction in the United States, this proposed act was defeated everywhere it was introduced except Colorado, and after its passage in Colorado, was soundly voted down by the American Bar as being ill-thought out and unworkable.

In Colorado, it is the general impression that the Act has worked well but still retains difficult sections. It dispenses, in effect, with disputes over whether or not a divorce, now technically called a dissolution, will be granted. However, all of the old hassles concerning property and children are still around although controlled by a clearer and better reasoned set of considerations.

With regard to the divorce/dissolution itself, the Court need only find that one person consistently believes the marriage to be "irretrievably broken". This is conclusionary evidence and not externally verifiable. For this reason, no effective ways have been found thus far to resist it.

Concerning children, the statute did make some important changes.

WHO CAN BRING A CHILD CUSTODY ACTION? It is now clear that parents can bring a child custody action either by filing for a dissolution of marriage, a legal separation, a declaration of invalidity or by filing a petition for custody alone, if they are not married to the person they are naming as the respondent. Also, a person other than a parent who has the child in his or her physical custody, or who has had the child in their physical custody for a period of six months, with that period being within six months of the commencement of

the custody action. It is necessary, however, that the notice of the custody proceeding be given to the child's other parent, or guardian or custodian. Additionally, any person may, upon convincing the Court that there is good reason for it, enter the action as a party.

CAN EXPERTS BE USED? The Act specifically provides that the Court may seek the advice of professional personnel and that such advice shall be given in writing. Additionally, the Act provides that where custody is disputed, there shall, upon the Motion of either party or upon the Court's own Motion, be a social work investigation.

HOW IS CUSTODY MODIFIED? Once a custody order has been entered, the new Act makes it rather difficult to change. If the Motion that the non-custodial parent files requesting a change of custody arises less than two years from the filing of a Motion for change of custody, the Court must find, before it even allows the Motion to be filed, that the child's present environment may endanger his physical health or significantly impair his emotional development. A problem arises in the difference that Judges give to the meaning of endangering and significantly impairing. Even if the Motion is allowed to be filed, the Court cannot change the custody unless it first finds that it would be "unconscionable" to leave the circumstances as they are. This term also is subject to much dispute, being more than a simple finding of best interest, but

not being clear how much more. It is also important to note here that the Court must make the finding of unconscionability upon circumstances that have arisen since the entry of the prior decree. This is rather a subtle distinction that is given more weight by some Judges than by others.

RULES OF EVIDENCE (HEARSAY)

Courts do not operate like people in the way they accept information for decision making. We have developed a system of excluding certain types of information or evidence that is felt to be either misleading or unreliable. These are usually implemented by one of the lawyers jumping up and saying "Your Honor, I object to that because . . . ." The Court will then rule on whether or not it is going to admit the evidence and the hearing will proceed.

It is interesting to note that sometimes the information gets in before the Court has had a chance to rule. A witness may volunteer an answer before the Court has had a chance to rule, or a lawyer may ask a "leading question" the classic of which is "When did you stop beating your wife?" Many of these rulings are discretionary with the Court and in many cases the Court will admit evidence that is marginal. In cases involving the custody and visitation of children, the Courts usually tend to allow nearly anything to be put into evidence. The rationale for this is that the seriousness of the matter and the Court's paternal responsibility to insure that the eventual outcome does actually serve the best interests of the children, justifies the admission of marginal or outrightly unacceptable evidence.

The most widely known and one of the most bothersome of the rules of evidence is the rule against the admission

of "hearsay." Hearsay evidence is something that a person testifies to that he did not directly see or hear. Additionally, written documents, such as your investigation report, will often contain information which was not directly observed.

The hearsay rule is observed more in its exceptions then in its actual application. Additionally, the Uniform Dissolution of Marriage Act makes specific provision for the entry into the record of social work and investigatory reports. These are considered confidential and are not available for public inspection.

As a clinician presenting testimony to a Court in a child custody or visitation matter, you are not expected to be an expert on hearsay or any of the other rules of evidence. It is the lawyer's responsibility to make appropriate objections and yours to answer the questions as the Court may desire. If you will listen with some care to the exchange between the attorneys and the Judge, when they are talking about the application of this or the other rules of evidence, you will quickly be able to gauge the Judge's attitude as to what she/he actually desires to hear. Remembering that the Court is in control and has the final responsibility, you can then proceed to provide the Judge with what is desired.

It is advisable, however, to emphasize the fact that

you personally observed something when you're testifying to it. Also, it is good to qualify your statements appropriately if they're based on something others have told you.

Another rule of evidence that is applicable to the testimony of clinicians, is their qualification as an expert. One of the rules of evidence is that opinion testimony is not admissible, since the making of opinions is what the Judge is paid to do. There is an exception here for persons who have expert knowledge in an area and can render to the Court subsidiary opinions that the Court will use in making the final decision. Due to the significant number of differences in the qualifications of clinicians, the education, training, and experience that you have had is highly relevant to the weight that will be given by the Court to your opinions.

RULES FOR TESTIFYING

1. ANSWER THE QUESTION THAT WAS ASKED

You do not control the courtroom, and you appear "at the Court's pleasure."

Caveat: If at the conclusion of your testimony, important points concerning the child have not been brought out, simply tell the Court so. Like this: "Your Honor, I feel some important information has not come out, and this bothers me. Is there a way to remedy this?" You can count on the Court to find one.

2. BE CONCISE

Take some time, even if the interval is uncomfortable, in order to avoid rambling.

3. STAY AWAY FROM JARGON

If you can't explain your craft/art in general English, then you ought not to be talking about it.

4. TELL THE TRUTH

Flat.

5. BE COMPETENT

It inspires confidence.

6. ADMIT LIMITATIONS

Yours or those of your procedures. This also inspires confidence.

> Non-clinicians often have a God-like view of "Psychology" and need to hear "I am not qualified to answer that question because . . . ." or "We don't yet know enough to make a judgment on that."

7. DON'T BUY THE LAWYER'S ACT

She/he is an advocate and often has a responsibility to test you. This is not aimed at you personally (but may be if the lawyer is overly involved). If you are competent and are telling the truth, no amount of "trial technique" will discredit your testimony.

8. BE EMOTIONALLY PREPARED TO SEE YOUR VALUABLE AND CAREFULLY DONE WORK TOTALLY IGNORED

Nobody wins them all.

9. EXPECT TO BE HEARD

A modulated portion of narcissism is valuable here. Psychiatrists usually have this; social workers often do not.

G L O S S A R Y

Affidavit	Information, which can be either true or false, that someone is willing to swear to in writing before a Notary Public.
Appeal	Something you do when you screwed up in the trial court. They are expensive, rarely work, and go from the District Court to the Court of Appeals and, if you're very lucky, occasionally to the Colorado Supreme Court. In child custody cases, the main thing that the Court of Appeals says is that in matters regarding children, the trial court has great discretion and their finding will be overturned only if it is clearly erroneous, which it nearly never is.
Attorney	A hired gun that a parent gets to make sure the other parent loses. In child custody cases the hired gun is supposed to zealously represent one parent while making sure that everything comes out in the end anyway. They tend to work too hard and drink a little too much.
Attorney's Fees	The heart of the matter.
Bailiff	Each division has one of these to maintain an orderly flow of cases and to determine who is in the courtroom and ask why they are there. Also their duties extend to controlling irrate husbands and emotional wives.
Best Interest of the Child	Not necessary to define as everyone is always sure they know what it is. In spite of this, it keeps Judges awake lots of nights.
Contempt of Court	This is what you are in when you don't do what the Judge told you to. He can fine you or put you in jail, or both if it's a good day. It occurs when one party gets really hacked off and files a Motion for Citation for Contempt and gets the Judge to issue a Citation. It can be very effective when the Judge says "If you don't do this then you're going straight to the County Jail."

Continuing Jurisdiction	The power of the Court to continue to make Orders on a subject that it has already entered final orders on. This applies to all matters concerning children while they are still dependent upon the parents.
Continuance	Something went wrong and we can't hear it today. It will have to be set over for six months. You will hear this a lot.
Custody Investigation	Instituted by the Judge when a custody dispute is in the offing. Usually a case worker from the Department of Social Services, the Court's domestic relations staff or Welfare Department talks to the parents, relations and friends and writes up a report. The report sometimes recommends one parent have custody. The Court's schedule for hearing matters, a docket clerk is designated in each court to "attempt" to prevent people from waiting . . . never works.
Decree	A final Order of a Court specifying that something that was isn't or something that is "ain't" as in a Decree of Dissolution of Marriage.
Dissolution	This is a divorce under a new name. The reason for changing the name is so that some of the older and more restrictive laws construing the meaning of the term "divorce" would not be applied under the new statute.
District Court	The Court of general jurisdiction in each County of the State of Colorado. This is where divorces and child custody actions are started and have jurisdiction which overlaps that of the Juvenile Court. It should be distinguished from all other Courts (Municipal, County, Superior, Court of Appeals, and Supreme Court).
Divorce	See Dissolution
Domestic Relations	Relations which should be domestic but are not. Law which deals with all aspects of marital unbliss and the children.

Extra-marital Sex	A sport not taken nearly as seriously as it used to be, which is really good because a lot more people are doing it. Most Judges don't get uptight about this unless it involves the children.
Irreparable Harm	See Temporary Restraining Order.
Summons	A document issued by a Court or a licensed attorney which tells someone that an action has been started against him and he had best get moving or he will lose.
Irretrievable Breakdown	What happens to a marriage when "the marital relationship of the parties has so broken down that the legitimate ends of matrimony are not accomplishable and there is not reasonable likelihood that the marital relationship can be established" or something like that.
Judge	An individual conclusively presumed to be literate, who decides things for money. Some are better than others. Even worse, some are better sometimes than they are other times.
Jurisdiction	This is roughly synonymous with the term power, meaning the power of the Court to enter an item regarding a certain person or a certain piece of property. As an example, the Court does not have the power or jurisdiction to enter an Order against someone in a divorce case unless they have been served with the papers in the action so that they have the chance to defend themselves.
Legal Separation	This is the new term for Separate Maintenance which is absolutely everything you get in a divorce except single. It becomes important in cases where there are moral restrictions on the part of one or both parties, and in some circumstances with regard to social security, military, and other governmental benefits.

Maintenance	This is the new term for alimony some of which is support for a spouse and is to be distinguished from child support which specifically relates to children. It has substantial Federal Income Tax consequences.
Marriage	An absolute prerequisite to getting a divorce. We do it oftener but less successfully than nearly any other country in the world.
Motherhood	Historically a condition or affliction which could be counted upon to send erstwhile jurists into seizures of overprotectiveness. This effect is diminishing rapidly but ain't all gone yet.
Notary Public	The lowest possible official of the State of Colorado whose function is to admit that someone swore to something in front of them. They get to then mash their seal on the paper which is their only reward.
Permanent Orders	The final hearing in a dissolution action at which time all issues between the parties are decided by the Court. This can be done by a Separation Agreement, which is the easy way.
Petition	The basic document which starts an action for Dissolution of Marriage. It tells the basic information about the marriage and the children and what that party wants from the Court.
Pleadings	Lawyer-talk for documents which will be filed with the Clerk of the Court.
Property Division	I'll give you the CB radio if you'll give me the color TV set.
Reconciliation	Not defined as this is becoming an obsolete concept.
Response	Just like the Petition only filed by the other party.
Separate Maintenance	See Legal Separation.

Temporary Restraining Order	Supposedly an "extraordinary" Order of the Court, often abused, which tells one of the parties to do or not to do something in order to avoid irreparable harm to the other party and the children. "Irreparable harm" is a term that is unclear in meaning but is necessary for use if you want to get the Order. It is commonly used to get the husband out of the house, but is available for use against the wife also.
Uniform Dissolution of Marriage Act	An act of the various State Legislatures at the instigation of the American Bar Association, passed in over half of the States. It is uniform in that all States have modified the same basic act in very different ways. Of course, none of them the same way.

Separation Agreement	The only document by which the parties can settle their differences without presenting them to the Court. This must be approved by the Court, and nearly always is.
Service	When a process server or deputy sheriff hands you legal pleadings and says "You are served." Commences a law suit when served with Summons and Complaint. Can be waived by signing a waiver and accepting the documents. Can't have jurisdiction over a person until he is served.
Shrinque	Any mental health worker who holds the status above a four-year degree in social work, on up through Board-qualified Analyst. They give opinions on things concerning children and are a boon to everyone involved as long as they're on your side.
Significant Relationship	He moved Trixie in with him.
Statute	An act of the State Legislature that they were willing to admit to publicly.
Stipulation	A mutual agreement entered into by both parties which, when approved by the Judge, becomes an Order and enforceable as such. Usually entered into to save a lot of hassle, court time and attorney's fees; i.e., stipulate as to custody but have the Judge determine the amount of child support.
Temporary Orders	This is an Order of Court usually shortly after the commencement of the action which says what is going to happen with all of the issues between the parties, including issues of children, until the Court can hear the matter in its fullness at Permanent Orders.

PRINCIPLES OF CHILD DEVELOPMENT

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PRINCIPLES OF CHILD DEVELOPMENT AND ISSUES REGARDING
GRIEF AND LOSS WITH SPECIAL CONSIDERATION
ABOUT ISSUES OF DIVORCE AND CHILD CUSTODY

I. Child development needs to be looked at from a point of view of a process. This process is to be considered as a continual one which progresses in terms of ups and downs with probable (in the healthiest of circumstances) gradual upward gains. Development is not a linear process, starting from point A and progressing in onward, upward straight line progress.

A. There are stages or levels of development. During each stage, there are particular developmental tasks to accomplish, and movement from one level to another is not always (probably never) clearly defined.

B. If the loss of a parent or divorce (another form of loss) is superimposed on any one of these levels of development, children are clearly, easily overwhelmed.

II. Levels of Development

A. Zero to 3 years

1. Zero to 6 months: During this developmental stage, the child is absolutely dependent upon the nurturing person -- dependent in terms of physical needs and emotional needs which are needed for his survival. The developmental task the child and the mother need to accomplish together is that of attachment.

2. Six months to 10-12 months: Separation-individuation is well underway. Mother (or nurturing person) needs to be there. Separation-individuation means the child is beginning to become a separate person, developing a separate self.

3. Twelve to 36 months: This is a crucial time of development. Separation-individuation continues at a much more concentrated pace. During the first part of it (age 1 to 2) the child continues his discovery of his world.

B. Three years to 7 years

This period of development is important in regard to the development of sexuality, formation of a conscience, and the first separation from home to go to school.

C. Seven to 11 years

Sexual curiosity and involvement are rather dormant until adolescence. Involvement occurs much more intensely with school, teachers and peers.

D. Twelve to 13 years

This marks the beginning of puberty with marked physical and emotional changes. This is a time of stress for both parents and children.

E. Fifteen to 16 years

Identity and independence are the primary issues. The child needs to be treated with respect for his ideas -- even if they are different or outrageous. The child may need to carry out his own plans, make a mistake and learn.

F. Sixteen to 20 years

Emancipation, continuation of identity and vocational choices are of importance in this stage of development. The child's own decisions about where he wants to live are very important and again, the seeking out of the visiting parent needs to happen and needs to be tolerated by the custodial parent.

III. Grief and loss

A. Of most importance in discussing grief and loss as it relates to divorce and child custody is the fact that dissolution of a relationship, i.e., divorce, is a loss. It needs to be grieved and worked through by both marital partners.

B. Secondly, the child mourns the loss (or partial loss) of the parent and the family relationship.

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TRIAL TECHNIQUES AND PREPARATION

By William P. Waggener

I. INTRODUCTION.

Preparation of a witness (expert or otherwise) for trial might well be described as the unsung hero of a successful trial case. Few Hollywood movies, or other similar glorifications of trial practice, have depicted the efforts of an attorney to present the salient facts and to prove the essential elements of his case through a clear, concise, and careful examination of the witnesses called. Rather, the fictional case is won by the searing or surprising cross-examination which totally destroys the key opposition witness or, just as often, by the dramatic and spell-binding closing argument which leaves the jury exhausted, misty-eyed, and, of course, completely convinced. The trial lawyer, however, trying his case in a real court, knows that success or failure ordinarily hinges on his ability to present direct and affirmative proof sufficient to merit a favorable verdict.

One of the difficulties encountered by a trial lawyer is that many witnesses are reluctant to testify in court, largely because they lack a familiarity with courtroom procedure. Despite the fact that a witness may have impressive credentials in his particular field and considerable clinical experience in applying his expertise, none of our schools which train these experts have anything in their curricula which trains the expert for appearing as a witness in a lawsuit.

It has come to the point where many psychotherapists are confronted with the necessity of appearing in court as expert witnesses. It would be of great value to the expert to be prepared and to learn a little bit about this interesting adventure of testifying as an expert.

II. SELECTION AND PREPARATION OF AN EXPERT WITNESS

In the event the parties and their attorneys cannot resolve the issue of custody before or after a statutory investigation and either or both have refused referral to Children's Diagnostic Center (or the court has rejected their petition for referral to Children's Diagnostic Center) how does the attorney proceed to select and prepare an expert witness for a custody hearing?

A. Who is qualified to Testify?

1. Statutes and case law
None discovered

2. Custom and practice
Almost anyone who has training in the behavioral science field (i.e. a psychotherapist) can be qualified as an expert.

B. Selecting an Expert

1. Where does the lawyer begin?

(a) Client interview may reveal that client has consulted a psychiatrist, psychologist, or psychiatric social worker.

(b) Client's family doctor may be able to help.

(c) Contact a doctor or lawyer who is a personal friend and ask his help.

(d) Become a member of the Interdisciplinary Committee for Study of Child Custody.

2. Factors a lawyer considers in selecting an expert.

(a) Educational training and decrees held.

(b) Experience in handling marital discords and custody problems.

(c) Awareness of recent developments in child custody field.

(d) Publications by the expert concerning child custody problems.

(e) Experience as an expert witness in custody proceedings.

(f) Availability and interest in helping the client.

III. PREPARATION OF AN EXPERT FOR A HEARING

1. Conferences and discussions prior to evaluation of client and child

(a) Contact expert sufficiently prior to trial to arrange for sufficient time to discuss the problems involved

(b) Make available any reports or information concerning background of parties and problems, also opposing expert's report, if any

(c) Find out how expert conducts his evaluation

(d) Arrange a conference with expert before findings and recommendations of evaluation are reduced to writing and before any report is made to the Court or opposing attorney

(e) Outline the order of the expert's testimony at trial, which will generally be as follows:

(1) The expert's qualifications

(2) The case history made available for the expert

(3) Manner in which the evaluation and psychological testing, if indicated, were conducted

(4) The findings or diagnosis

(5) Recommendations or course of treatment

(6) An explanation of how the expert arrived at his recommendations and upon what they are based

(7) Prognosis for improvement of the problem encountered based upon the expert's recommendations

(8) Number of visits with the parties involved and the approximate time spent in evaluating as well as reaching findings and recommendations

(9) The amount of the expert's fees

2. Preparing Expert for direct examination

(a) Arrange conference following evaluation to discuss findings and recommendations

(b) Review reports of opposing experts and their qualifications

(c) Review the order of expert's testimony

(d) Find out strengths and weaknesses of expert's report, i.e. what documentation (versus impression) does he have to support his recommendations

(e) Find out if there are areas where expert has difficulty expressing himself and work on those with him

(f) Give the expert witness extra consideration. If possible, plan to have him testify at a definite hour on a definite day, even if it is necessary to temporarily suspend the testimony of other witnesses.

3. Preparing Expert For Cross-Examination

(a) General Advice

If the opposing attorney asks a question that calls for a "yes" or "no" answer, which the expert feels cannot be answered that simply, the expert should ask the judge if he can explain his answer.

If the expert has stated an opinion under direct examination, he should stand by his guns and not let the opposing attorney intimidate him into changing his opinion.

See "Pointers for Witnesses" in Appendix A attached hereto.

(b) Qualifications

Count on the fact that the opposing attorney has reviewed the expert's qualifications and will exploit his lack of qualifications to evaluate the case in question.

(c) Books and Articles

The opposing attorney may use certain books and articles in an attempt to contradict

the opinions stated by the expert. Accordingly, he may ask "Are you familiar with this book?", and state the author and title of the book. "Do you recognize this book as authoritative in its field?" If the answer is "Yes", then he can use the book by reading a paragraph or sentence from it and ask whether the expert agrees or disagrees with that particular excerpt. In answering the question, remember always that psychotherapy is not an exact science, and it is the expert's privilege to disagree with the opinions of the most eminent specialists. As we all know, even specialists are constantly changing their own opinions of various concepts.

If on the other hand, the expert doesn't happen to know the book or its author, he should so state. Only if you acknowledge that the book or treatise is authoritative in its field can that literature be used to contradict the expert's opinion testimony.

(d) Attacking the Expert's Opinion Itself

The main attack on cross-examination will be the opposing counsel's attempt to quarrel with a diagnosis and recommendations for treating the problem. It is an attack upon the opinions that the expert gave relating to causation, diagnosis and prognosis. The various ways of accomplishing such an attack are as follows:

(1) That the expert made his diagnosis on purely subjective complaints.

(2) That the expert didn't have the complete and accurate case history.

(3) That the parties evaluated could be feigning or malingering, and that the expert did not give any test to rule this out. (Be prepared to defend your use of, or decision not to use, psychological testing.)

(e) General Demeanor

Be yourself. The expert should convey to the court by his manner that he is sincere, that

he is there in an attempt to be helpful and to clarify his diagnosis and treatment.

No attorney on cross-examination, regardless of how capable he is, regardless of his histrionics or eloquence, can trip up the expert if he is telling the truth and stating his opinions as carefully as he has formulated them. There is no substitution for this careful and detailed preparation; and from such preparation, both the attorney and the expert will acquire the competence to pilot themselves through the rocks and shoals of this fascinating dramatic enterprise, the trial.

POINTERS FOR WITNESSES

1. TELL THE TRUTH - a lie may lose the case. In a law suit, as in all other matters, honesty is the best policy. Telling the truth, however, means more than refraining from telling a deliberate falsehood. Telling the truth requires that a witness testify accurately about what he knows. If you tell the truth and tell it accurately, nobody can cross you up.

2. DON'T GUESS - if you don't know, say you don't know, but don't let the cross-examiner get you in the trap of answering question after question with "I don't know".

3. UNDERSTAND THE QUESTION before you attempt to give an answer. You can't possibly give a truthful and accurate answer unless you understand the question. If you don't understand, ask the lawyer to repeat it. He will probably ask the Court Reporter to read it back. Keep a sharp lookout for questions with a double meaning and questions which assume you have testified to a fact when you have not done so.

4. TAKE YOUR TIME - Give the question such thought as it requires to understand it and formulate your answer and then give the answer. Do not give a snap answer without thinking, but bear in mind that it will look bad if you take so much time to answer each question that the jury will think you are making up an answer.

5. ANSWER THE QUESTION that is asked and then stop. Don't volunteer information not called for by the question you are asked.

6. TALK LOUD ENOUGH so everybody can hear you. Don't chew gum and keep your hands away from your mouth. You can't speak distinctly while chewing gum or with your hand over your mouth. Dress conservatively and be well groomed.

7. GIVE AN AUDIBLE ANSWER so the court reporter can get it. Don't nod your head yes or no.

8. DON'T LOOK AT THE LAWYER FOR HELP when you're on the stand. You're on your own. You won't get any help from the Judge either. If you look at the lawyer for

your side when a question is asked on cross-examination or for his approval after answering a question, the judge is bound to notice it and it will create a bad impression.

9. KNOW YOUR NAME and where you live and how old you are, and when you were married, etc.

10. DON'T FENCE OR ARGUE WITH THE LAWYER on the other side. He has a right to question you, and if you give him some smart talk or give evasive answers the Judge may jump down your throat. Don't answer a question with a question unless the question you are asked is not clear.

11. DON'T LOSE YOUR TEMPER no matter how hard you are pressed. Lose your temper and you may lose the case. If you lose your temper you have played right into the hands of the other side.

12. BE COURTEOUS. Being courteous is one of the best ways to make a good impression on the court. Be sure to answer "Yes, sir" and "No, sir" and to address the judge as "Your Honor."

13. IF ASKED WHETHER you have talked to the lawyer on your side, or to an investigator, admit it freely. Remember you are not getting paid for your testimony, you are being reimbursed for the time you lose and your expenses.

14. AVOID JOKING AND WISE CRACKS. A law suit is a serious matter.

15. DON'T BE AFRAID to look the Judge in the eye and tell him the story. The Judge is the trier of the facts and he wants to hear what you have to say. Look at him most of the time and speak to him frankly and openly as you would to a friend or neighbor.

16. GIVE A POSITIVE ANSWER when you can. You were "sworn" to tell the truth when you took the stand. Avoid such phrases as "I think," "I believe," "in my opinion" and "probably."

MODIFICATION OF PERMANENT ORDERS

By William P. Waggener

C.R.S. 1973, 14-10-131. Modification.

(1) If a motion for modification has been filed, whether or not it was granted, no subsequent motion may be filed within two years after disposition of the prior motion unless the court decides, on the basis of affidavits, that there is reason to believe that the child's present environment may endanger his physical health or significantly impair his emotional development.

(2) The court shall not modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interests of the child. In applying these standards, the court shall retain the custodian established by the prior decree unless:

(a) The custodian agrees to the modification;

(b) The child has been integrated into the family of the petitioner with the consent of the custodian; or

(c) The child's present environment endangers his his physical health or significantly impairs his emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

C.R.S. 1973, 14-10-132. Affidavit practice.

A party seeking a temporary custody order or modification of a custody decree shall submit, together with his moving papers, an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other parties to the proceeding who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.

In re Marriage of Harris, 23 _____ Colo. App. _____, _____ P.2d _____ (1975) 4 the Colorado Lawyer 2189 (1975) clarified the meaning of the Modification section which provides; "If a motion for modification has been filed, whether or not it was granted, no subsequent motion may be filed within two years after disposition of the prior motion . . ." There the court ruled that the original order does not start the two-year statute running. Accordingly, it was possible to have a modification hearing approximately 8 months after entry of the original decree.

VISITATIONS - A VIEW FROM THE COUCH

James D. Tulloch, M.D.

A. The "Need" for Visitation
   1. For the Child
   2. For the Adult

B. Anticipation in Planning Visitation
   1. Warning Signals of Problems Ahead
   2. "Structured" Visitation Agreements vs. "Reasonable and Proper" Visitation Agreements

C. Visitation and the Child's Sense of Time and Continuity - Arrangement of Visits for Children at Different Ages
   1. The Infant
   2. The Toddler
   3. The Preschooler
   4. The Early School Age Child
   5. The Adolescent
   6. The Role of Siblings

D. Visitation Failures - Some Thoughts on Causes and Remediation

E. A Moment for Free Association

VISITATION

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I.

RIGHTS TO VISITATION WITH CHILDREN

A. Colorado Revised Statutes 14-10-129 (1973) provides as follows:

> " (1) A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds after a hearing, that visitation by the parent would endanger the child's physical health or significantly impair his emotional development.
>
> (2) The court may make or modify an order granting or denying visitation rights whenever such order or modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger the child's physical health or significantly impair his emotional development."

1. A parent is entitled to reasonable rights of visitation in every case, unless the court holds a hearing and finds that visitation with the non-custodial parent would endanger the physical health of the child or significantly impair his emotional development. Only in a rare case will the court totally deny visitation to the non-custodial parent. Visitation may, however, be limited by the judge to short periods of time (e.g., one or two hours), it may be limited to certain locations (e.g., the home of the custodial parent or the home of a grandparent), or the court may order that the visitation be supervised, i.e., that it take place only in the company of a designated third party such as a

grandparent, a brother or sister of one of the parties, or a welfare worker.

2. Grandparents, step-parents, aunts, uncles and all other non-parents have no legal right to visit with a child; however, the judge may, in his discretion, order visitation with a non-parent, if he feels that it would be in the best interests of the child to do so. Rarely will the court order such visitation with a non-parent, however. Chances for obtaining a court order for visitation between a child and a non-parent would, in most cases, be greatly enhanced by having a mental health expert testify that he has evaluated the situation and that in his professional opinion the requested non-custodial visitation is essential to the emotional development and well being of the child. Before attempting to obtain an order from the court for visitation with a non-parent, counsel should carefully consider whether such an order is really necessary and whether the visitation can likely be accomplished informally, without a court order. If, for example, the non-custodial parent is scheduled to have the child for one month of visitation during the summer and would like to have the child spend part of that month with the grandparents, or some other non-parent, the Separation Agreement should specify that such visitation is agreeable. If there is

no agreement and the case is being resolved by the court, the judge should be requested to include in his order that the child may spend a portion of the summer visitation period with the grandparents.

3. The determination as to who shall have visitation rights, and on what terms, is reached in one of three ways: by agreement of the parties, by order of the court, or partially by agreement of the parties and partially by order of the court.

   (a) The parties may, by agreement between themselves, establish visitation on virtually any terms they wish. As with agreements concerning custody of the children, any arrangements between the parties respecting visitation are subject to the approval of the court. Rarely, however, will the court veto visitation arrangements that have been worked out by agreement of the parties. It is almost always more satisfactory to have the parties make an agreement between themselves respecting visitation than to have the court impose the terms of visitation on them. Psychologically, experience indicates that visitation goes more smoothly and the parties feel better about it when they have negotiated the terms between themselves rather than having had them "jammed down their throats" by the judge. In addition, an agreement between

the parties concerning visitation can be tailored to include as many details as may be necessary or desireable to make the visitation run as smoothly as possible, whereas, a court order concerning visitation will rarely contain the detailed provisions that are frequently necessary to help make it run smoothly.

(b) There is no law, court rule or universal guideline which judges follow in determining the nature and extent of visitation in any given case and, as a result, the frequency and duration of visitation can vary greatly from one judge to another. Two weekends per month, two weeks in the summer and alternating of visitation/custody on major holidays, is probably the norm. The judge will frequently ask counsel: "How much visitation do you want?" If custody has been in issue and left to be determined by the judge, the parties have probably given little thought to the specifics of visitation in the event the court awarded custody to the other party. Counsel should consider either submitting to the court a written proposal for visitation, in the precise language desired and including as many details as are felt to be necessary in order to have the visitation run smoothly, or, in the alternative asking the

court to defer any orders concerning visitation in order that counsel and the parties may attempt to arrive at a stipulation of their own concerning visitation. Since the orders which the court entered concerning custody and other matters must usually be reduced to writing by counsel, any provisions concerning visitation which the parties are able to agree on can usually be incorporated in the written order and can include as much detail as the parties desire and can agree upon.

II.

"REASONABLE" VISITATION vs.
SPECIFIED VISITATION

A. There are two schools of thought among attorneys and judges as to whether visitation should be set for specific days and times or should be merely defined as "reasonable", to be worked out between the parties.

1. Most attorneys and judges seem to prefer "reasonable rights of visitation" to the non-custodial parent. The thinking seems to be that the parties shouldn't be tied to a schedule, that the visitation will be more meaningful if it is spontaneous, that circumstances change which make specified days and times for visitation unwieldy, and that the parties can always work out among themselves, or return to court for, more specific visitation, if the

original arrangement fails to work out.

2. In most cases, the parties have much to gain and little or nothing to lose by having the court's order or their own Separation Agreement specify the time and rules for visitation. Probably the greatest benefactors of specific and detailed arrangements are the children.

   (a) Advantages.

      i. Makes it possible for all parties to plan ahead.

      ii. Children will probably end up with more frequent and more regular visitation with the non-custodial parent.

      iii. Greatly reduces chances for hassles connected with visitation.

      iv. Particularly helpful in minimizing friction after one or both parties remarries.

      v. Can always be modified by agreement of parties.

   (b) Disadvantages.

      i. Specified times and days for visitation may be unworkable if non-custodial parent has an irregular work schedule.

      ii. Parties may not want to be tied to a specific visitation schedule. Non-custodial parent may object because he feels he is required to have the children on the scheduled dates, whether he wants them or not.

iii. Even if specified days and times for visitation are not desired or would not work in the circumstances, detailed rules and guidelines for visitation should nevertheless be incorporated in the court's order or the Separation Agreement of the parties.

III.

ENFORCEMENT AND MISUSE OF VISITATION RIGHTS

A. Contempt of court proceedings.

1. The court has the power to enforce its own orders concerning visitation as well as the provisions of any Separation Agreement between the parties concerning visitation, provided that the agreement was incorporated in and made a part of the Decree of Dissolution. Even if the agreement was not incorporated in the Decree, the court still has the power to insure that the non-custodial parent is afforded reasonable rights of visitation and, on the other hand, to insure that visitation with the non-custodial parent is on such terms and conditions as will not result in physical harm to or substantial impairment of the emotional or moral development of the children.

2. Contempt of court proceedings are not a panacea, since most courts have little patience with parties who expect the court to resolve every minor disagreement they have

concerning visitation. Also, the contempt remedy is only available if the alleged guilty party is within the State of Colorado.

B. Removal of children from Colorado.

1. There is no law that provides that a custodial parent may not remove the permanent residence of the children outside the State of Colorado. The court order concerning custody and visitation or the Separation Agreement of the parties should contain such a provision. Even if it does not, the court would undoubtedly consider a request by the non-custodial parent to prohibit the removal of the permanent residence of the children from the State. If, however, the custodial parent has already moved the residence of the children to another state, the Colorado court may well concluded that it no longer has jurisdiction over the children. The criterion used by the court in determining whether or not to permit the removal of the permanent residence of the children to another state is whether such a move would be in the best interests of the children. In the judgment of the speaker, Colorado courts have been overly liberal in concluding that the removal of the permanent residence of the children to some other State would be in the their best interests. See, e.g., Nelson vs. Card, 162 Colo. 274, 425 P.2d 276 (1967). The present state of the law provides little protection for the non-custodial parent against the removal by the custodial

parent of the residence of the children to another state, even though such removal will have the effect of severely limiting visitation between the children and the non-custodial parent.

2. If the non-custodial parent resides outside the State of Colorado, he may be required by the court to post a bond before he is permitted to remove the children from the State. In addition, the Colorado Kidnapping Statute (C.R.S. 18-3-304 (2)) provides as follows:

> " Any parent or other person who violates an order of any district or juvenile court of this state, granting the custody of a child under the age of eighteen years to any person, agency, or institution, with the intent to deprive the lawful custodian of the custody of a child under the age of eighteen years, commits a class 5 felony."

Therefore, a non-custodial parent, or other person, who removes children from the State of Colorado and fails to return them in accordance with any existing order of court may be extradited from another state to the State of Colorado to face criminal prosecution.

IV.

SOME SPECIFIC PROBLEMS CONCERNING VISITATION

A. Complaints by custodial parent about conduct of non-custodial parent during visitation.

1. Custodial parent is living with his girlfriend or he and his girlfriend plan to take the children camping

and they will all sleep in the same tent (he and his girlfriend have sleeping bags that zip together).

2. Non-custodial parent uses drugs or drinks to excess during visitation.

3. Non-custodial parent is an unsafe driver or exposes the children to dangerous situations.

B. The children refuse to go with the non-custodial parent for visitation.

C. "He has not paid his child support, can I refuse to let him see the kids?"

APPENDIX A

VISITATION PROVISIONS - An Example

1. CHILD CUSTODY AND VISITATION

1.1 Both parties are fit and proper persons to have custody of the children; however, Wife shall have the permanent care, custody and control of the minor children, based upon the present circumstances of the parties and the present best interests of the children.

1.2 In the event Wife should become disabled or for any reason be unable to adequately care for the children for any period in excess of seven days, custody of the children shall be transferred to the Husband for the balance of the period of Wife's disability or inability to care for the children, unless otherwise agreed by the parties. In the event of the death of Wife, Husband shall have the custody of the children.

1.3 Husband shall be entitled to reasonable and liberal rights of visitation with the children, on the following terms and conditions, or on such other terms and conditions as the parties may agree:

1.3.1 Husband shall be entitled to visit with the children two weekends per calendar month, from 6:00 o'clock p.m. Friday to 8:00 o'clock p.m. Sunday, or such parts of said weekends as Husband may elect, plus such additional visitation each calendar month as the parties may agree upon, provided, however, that Husband shall give Wife

at least 48 hours advance notice of his desire to exercise such rights of visitation, or such other advance notice as may be agreed upon between the parties.

1.3.2 Husband and Wife shall alternate visitation/custody during each of the following holidays and holiday periods, unless otherwise agreed between the parties:

Spring Vacation

Easter Sunday

Memorial Day Weekend

Fourth of July Weekend

Labor Day Weekend

Thanksgiving Weekend

Beginning of Christmas School Vacation to noon of Christmas Day

Noon of Christmas Day, to end of Christmas School Vacation

In the event both Husband and Wife desire custody/visitation with the children during any of the above holidays or holiday periods, the party who did not have custody/visitation with the children during the same holiday or holiday period of the immediately preceeding calendar year shall be entitled to first preference respecting the period in question.

1.3.3 Husband may have extended visitation with all or some of the children, as he may elect,

at his residence or such other reasonable places as he may elect, without limit as to state or country, during summer and other school vacations, for periods totalling at least sixty days, per child, per calendar year, in such increments as he may elect, provided, however, that Husband shall give Wife at least thirty days advance notice of his intention to exercise such visitation rights. All travel expenses for the children in connection with such extended visitation shall be paid by Husband. During such periods of extended visitation amounting to fifteen or more consecutive days, child support payments by Husband to Wife shall abate 50% if Wife is not remarried and 75% if Wife is remarried, for each child with whom Husband is exercising such extended visitation. For purposes of said abatement, proration shall be made to the day. The day on which the extended visitation commences shall not be counted as a day of visitation for proration purposes, however, the day on which said extended visitation terminates shall be considered a day of visitation for proration purposes.

1.4 In order to promote the greatest possible love and respect between the parents and the children, each parent shall make a concerted effort to promote such love and respect between each child and the other parent. Neither Husband nor Wife shall malign the other to or in the presence of any of the children;

neither party shall commit any act, by word or deed, which might tend to have a negative effect upon a loving, companionable and harmonious relationship between any child and the other party; and neither Husband nor Wife shall in any way attempt to alienate the affections of any child for the other party.

1.5 Husband and Wife shall confer with each other on all important matters concerning the health, welfare and education of each child, with a view toward arriving at a harmonious policy. Wife shall forthwith notify Husband, by telephone or telegram, in the event any child should be seriously injured or become seriously ill. As used herein, the term "seriously injured" or "seriously ill" shall mean any injury or illness which requires confinement to a hospital for any period of time or confinement to bed, other than in a hospital, for more than three consecutive days. In the event any child should become "seriously injured" or "seriously ill" during any period of visitation with Husband, the foregoing notice requirement shall also apply to Husband.

1.6 Wife shall not move her residence and that of the children outside the 48 contiguous United States without the prior written consent of Husband or an order of a court authorizing same.

1.7 Wife shall, at all times, keep Husband informed as to the current address and telephone number where the children may be contacted and shall forthwith notify Husband of any change of such address or telephone number. At least once each calendar

month, Wife shall advise Husband, either by letter or by telephone, at her expense, of the development, accomplishments and other matters of interest respecting the children. In addition, Wife shall insure that each of the children who has reached the second grade in school writes a letter to Husband, at least once each calendar month. If Husband so requests, Wife shall, at least once each six calendar months, send to Husband at least twenty current color snapshot photographs of the children. In the event Husband makes a request for said photographs, he shall furnish to Wife, at his expense, a camera for said purpose. In addition, the cost of processing of said photographs shall be paid for by Husband. The film shall be purchased by Wife, at her expense.

APPENDIX B

VISITATION PROVISIONS - An Example

1. CHILD CUSTODY AND VISITATION:

1.1 Both parties are fit and proper persons to have custody of the children, however, Wife shall have the care, custody and control of children, based upon the present circumstances of the parties and the present best interests of the children.

1.2 Husband shall have reasonable rights of visitation with the children in accordance with the following ten (10) week cycle: the first weekend he shall have visitation with the minor child, Todd, the second weekend he shall have visitation with both children, the third weekend the two minor children will remain with Wife, the fourth weekend Husband shall have visitation with the minor child, David, the fifth weekend the Husband shall have visitation with both of the minor children, the sixth weekend Husband shall have visitation with the minor child, Todd, the seventh weekend both of the minor children shall remain with the Wife, the eighth weekend the Husband shall have visitation with both of the minor children, the ninth weekend the Husband shall have visitation with the minor child, David, and on the tenth weekend both of the minor children shall remain at home with the Wife, the ten (10) week cycle to commence again in the same rotation beginning the following weekend. Weekend visitations shall commence at 6:00 o'clock p.m. on Friday and end at 7:30 o'clock p.m. on Sunday. On weekends when the Husband has both of the minor children, the

time limits for visitation are not to be changed, however, when Husband has visitation with one of the minor children, he may elect to have a shorter visitation period either by commencing the visitation later, such as on Saturday morning instead of Friday evening, or ending it sooner on Sunday than the 7:30 o'clock p.m. time.

1.3 Husband shall also be entitled to thirty (30) days extended visitation with each child each calendar year, in such increments as he may elect and with either or both of the children, as he may elect, provided, however, that Husband shall exercise at least fourteen (14) consecutive days of extended visitation with both children together each summer. Husband shall advise Wife at least thirty (30) days in advance of the date on which he would like to commence extended summer visitation, or such other advance notice as may be agreed between the parties.

1.4 The parties shall alternate visitation with the children each Thanksgiving, Christmas and New Years. Wife shall have visitation with both children for Thanksgiving Day of 1975, Husband shall have visitation with both children for Christmas Day of 1975, and Wife shall have visitation with both children on New Year's Day of 1976. Thereafter, visitation with the children shall be alternated between the parties on each holiday. Visitation on any other holidays during the year shall be in accordance with the normal weekend visitation schedule as hereinabove provided. If the holiday visitation time outlined

in this paragraph falls on a weekend or immediately before or after a weekend, it is agreed and understood that the holiday visitation period supersedes the normally scheduled visitations agreed to in paragraph 1.2 and the visitation that would have occurred but for the holiday shall be postponed until the next non-holiday weekend, at which time the regular schedule shall resume.

1.5 All provisions contained in this section respecting visitation with the minor children shall be modifiable by the parties on such terms and conditions as they may agree.

1.6 Wife shall have the right to temporarily leave the State of Colorado with the minor children for periods of time not to exceed thirty (30) days per calendar year, unless expressly agreed otherwise between the parties. Wife shall not move the residence of the children outside a seventy-five mile radius of the City and County of Denver, State of Colorado, without the written approval of the Husband or an order of the Arapahoe County, Colorado District Court, after notice to Husband and hearing to determine whether or not such move would be in the best interests of the children.

GUARDIAN AD LITEM

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Guardian Ad Litems can be appointed in domestic relations cases regarding the issues of child custody or visitation through the inherent power of the Court pursuant to 14-10-116 C.R.S. 1973 as amended. In dependency and neglect actions originating in the Courts of Juvenile jurisdiction a Guardian Ad Litem is appointed pursuant to 19-3-105 C.R.S. 1973 as amended.

When an attorney represents a child as "attorney" vs. representing a child as a "Guardian Ad Litem" the form of representation may not vary. The forms of representation do vary when the child or children represented are of such an age that they can voice and speak their own opinions and desire that their positions be made known to the Court. Guardian Ad Litems are required by definition to represent the minor or infants best interests in any suit which the minor or infant may be a party. An attorney, by definition, is one who is an advocate, counsel, or official agent employeed in preparing, managing, and trying cases in Court. The chief and principle distinction between the two are "'best interests' vs. 'advocate'".

The Court, in domestic relations actions, can appoint an attorney to act in the capacity as a Guardian Ad Litem upon its own motion or upon the motion of either party. In domestic relations actions a Guardian is required by the Court to make an impartial determination as to the best interests of the child or children involved.

The Guardian Ad Litem is to utilize all resources which would be made available through the Court of appointment which would include the Probation Department reports, Welfare Department reports, confidential information received by the Court regarding the parties, and children's mental and physical examination of the respective parties if available. The Guardian Ad Litem's recommendation should be based upon his -r her own observation combined with facts and information acquired from other sources.

Guidelines for Guardian Ad Litems:

1. Accept the appointment as Guardian Ad Litem and read the Court file.
2. Contact the Probation counselor or Domestic Relations investigator assigned to the case.
3. Confer with the Probation Counselor or Welfare Department worker.
4. Personally interview the parents, children, and/or custodian of the child.
    a. Interview each child privately.
    b. Include at least one home visit with advance notice to each home being considered.
5. Interview people having contact with and knowledge of the child (i.e. school personnel).
6. Contact people knowing the parents or used as references by the parents.
7. Exchange information with other professionals involved (i.e. psychologists, psychiatrists, social workers, probation counselors).
8. Read and review a report of domestic relations division probation officer.

9. Prepare a tenative report of your conclusions and the basis for them. Determine if the Court desires a copy of the written report.

10. Attend the hearing, being aware of the Guardian's power to cross-examine witnesses, to subpoena witnesses, and to offer testimony. Be prepared to offer the Court a recommendation on the advisability of the children testifying or conferring with the Judge.

11. At the close of the testimony, if necessary to properly determine the issue, request time to file a written report with copies to the parties.

12. Determine with the Court whether you should be discharged prior to the time for appeal.

13. Should the outcome be adverse to what the Guardian's belief is to the best interest of the children, determine whether you as a Guardian Ad Litem should appeal.

The Guardian Ad Litem in reaching his or her determination as to the best interests of the minor child or children should consider the following:

1. The love, affection and other emotional ties existing between the proposed custodians and the child.

2. Assessment of the physical and mental health of the child and proposed custodians.

3. The amount of time that proposed custodians will have available to devote to the child and the quality of their interaction with the child.

4. Background of the proposed custodians.

5. Home situation that would be created for the child by each proposed custodian.

6. Proposed plan of the custodian for the care, supervision and education of the child.

7. Basic motivation for desiring custody.

8. Child's wishes based on chronological age and emotional maturity of the child.

9. History of the prior relationships of the proposed custodians with the child.

10. Attitude toward visitation of non-custodial parent created by proposed custodial parent.

11. Recommendations of the trained social worker or marriage counselor and that of psychiatrist, psychologist, psychiactric social workers or other professionals if involved.

12. Reference to existing statutory and Colorado case law as applied if any in the specific fact situation.

Follow-up therapy

Leona M. Kopetski, ACSW

I When follow up therapy is indicated:

1. To resolve a grief reaction that is "stuck" - usually at the anger stage. (Usually symptomatized by repeated court appearances over visitation or custody).

2. To resolve developmental problems from the past which led to the establishment of an unsatisfactory marriage, a divorce, or the inability to complete the process of mourning and make a new adjustment.

3. In the custodial parent, therapy might be needed to prevent use of the children to meet inappropriate interpersonal needs or to help carry the burden of being a single parent. (Custodial parents may be too close or too distant or too overwhelmed with the children.)

4. For the non-custodial parent therapy can help to structure a relationship with the child as a visiting parent.

5. For the children, therapy can help resolve losses, loyalty conflicts, guilt, or separation anxiety if these symptoms remain after the family relationships are reorganized and settled.

II. Important issues in follow-up therapy:

1. Grief over loss of the child. In the identification with the child, the non-custodial parent also loses a chance to rework issues from his or her own early development.

2. Grief over loss of the spouse and those people from the past that the spouse represented.

3. Psychological problems which were being handled through relationships with the spouse or the children now need a new resolution.

CHILDREN IN THE COURTROOM

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CHILDREN IN THE COURTROOM

A. First of all it would appear that courts are not well designed for children, for example:

1. The bathroom equipment does not appear to be equipped at all to be a scale for use by children.

2. The marble halls echo each running step, scream, or other noise that the active, normal child would make.

3. Everyone is expected to act as if they were very "adult".

4. There are no toys so you have to make due with what there is. You can play with the swinging door on the little fence in the courtroom, lie down on the hall bench, get people to notice you by crying a bit, rattle your candy paper, or say loudly in the midst of a dramatic courtroom moment, "Mommy, I have to go wee-wee".

5. The people who talk to you look down at you and speak with great dignity and smell of cigarette and cigar smoke, breath in your face and talk in big words.

6. For the child the court is a scary and strange place.

7. Children are not protected by arrangements of waiting areas from harassment by other witnesses, being in the presence of estranged parents and families, and may be torn asunder while waiting for their turn to appear.

B. It is important that lawyers and judges meet and talk to children in order to understand what is happening with the child. To do this certain principles apply.

1. Take off your coat or robe.

2. Attempt to get down physically to the child's level where you can talk.

3. Do things to help the child feel somewhat more comfortable.

4. Assure the privacy of your conversation.

5. Start to talk to the child about a neutral topic like "How old are you? Where do you go to school? What grade? Do you have any brothers or sisters? What are their names?, etc., etc."

6. Don't begin with monumental statements like "You must now decide who you love most and who you wish to be with, your mother or your father."

   Or "Do you fully understand the nature of these proceedings and do you understand that you must seek to examine your own motives, determine whether or not you have been unduly

influenced by pressures from either of the litigants within this proceeding and understand that you will reside in the domicile decreed by this court -- you do understand that, don't you, child?"

7. Understand that the experience which the child is undertaking has to be one of the most profound of his lifetime and even though he may not be able to express himself fully in words, the emotional impact may be far greater than he says. The fact that he crys in spite of the fact that you are being very nice to him may be an indication that he does fully understand what's happening and that his life is about to change dramatically.

8. Allow yourself sufficient time and if possible, have more than one meeting with the child in order to establish some sense of rapport. Remember that those in mental health who work with children work for a lifetime to perfect their techniques of rapport and involvement with the child. A little extra work by members of the legal profession in developing a bit of technique would probably be in order.

9. Attempt to protect the child as much as possible from the warring factions, the heated barbs, and those unfortunate things that may be said in his presence. Do not have him wait any longer in the corridor than absolutely necessary and make certain that he is shepherd quickly in and out of the courtroom building. One of the attorneys should make a point of explaining to the child, to the best of his ability, what the proceedings are about and the results from them and what they mean to the child.

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I. Attorneys

1. Recognize your expert's reluctance to take the witness stand as most medical and mental health professionals are quite reluctant to do so.

2. Make your expert aware before hand of any legal facts or problems or evidence or testimony that you are aware of (pornography in case discussed).

3. Do not simply ask for conclusions. Ask your expert to report his total examination.

4. The following five questions in order have been proposed as the most useful by Dr. John McDonald in a criminal proceeding. They apply to any other kind of professional testimony in any other kind of legal proceeding.

   A. When did you make your examination?
   B. How often did you see the individuals at question?
   C. What was the duration of your examination?
   D. What did your examination consist of?
   E. What did you find?

5. Your witness may on the witness stand present testimony that actually favors a conclusion contrary to his own final opinion. You may want to have him elaborate on any such seeming contradictions.

6. An expert may change his opinion secondary to evidence heard at trial or information supplied during cross examination. If you failed to appraise him of that evidence beforehand you are fully to blame for anything that happens. Be prepared on re-examination to explore this kind of unanticipated event fully.

7. Avoid hookers. Ask your own witness no questions that he has not been reasonably able to expect from you beforehand. If you get a brilliant and sudden insight that causes you to ask a question remember that it may be one that can't easily be answered by your expert or that may get you an answer that you are not at all expecting. Additionally, it may frustrate and confuse your expert and by doing such you may weaken his credibility.

II. The Expert

1. Should take his time, consult his notes as needed, answer the questions asked, amplify yes or no questions as needed, and avoid evasive answers.

2. He sould correct errors as he becomes aware of them, and be comfortable in admitting his own limitations.

3. The expert may at times aid in the reformulation of questions if an unexperienced attorney seems to be fumbling or seems confused or is not using words properly, but where the trend of his question is clear. Often this is unintentional and is not designed to trip up the expert and in either direct or cross examination may be fully appropriate though it should have been attended to in direct examination before taking the witness stand. This is different from clarifying questions deliberately asked in a misleading way on cross examination.

4. Use simple nontechnical language, but do not over simplify. Do not be too general or too categorical.

5. Pretentiousness and an air of absolute certainty usually alienates triers of the fact.

6. Admit freely valid points raised by the opposition and if necessary explain how they fit in to your understanding of the problem before the court.

7. Be prepared to be frank about fee discussions if asked. Remember that you are paid not "for your testimony" but for your "time."

8. Consider your dress before coming to the courtroom. Consider how a jury and how the judge may regard you by your appearance.

9. Be ready for hypothetical questions, (that is, questions with a limited assumed set of facts). Consider what facts may be distorted or missing in the hypothetical question. Try to answer the hypothetical question within any limits posed but point out any limits to the question if clearly evident and also clarify your answers if you feel that is necessary. Hypothetical questions may often be used to distort a situation, or to pose to the expert evidence admitted to testimony by other experts or other witnesses.

10. On cross examination meet any rudeness with courtesy; try your damndest to avoid anger though an occasional cryptic remark, well-timed and well-dosed can be an effective way to make a point. Be ready to hear emphasized by the attorney defending an opposite view point, any suggestion of inadequacy of your examination, faulty logic on your part, improbable psychological explanations, evasiveness, hints of inexperience, uncertainty or prejudice.

11. Qualify your answers on cross examination as you please, to convey your meaning accurately. Point out any distortion or misquoting of any of your prior testimony and listen carefully as sometimes those distortions are subtle and may lead you into difficulty or appear in a misleading way in the transcript if you overlook the distortion.

12. Remember the role of the professional witness. The professional witness is there to advise the trier of the fact and not to interpret the law. In the history of the jury trial, reasoned conclusions were attempted to be determined based upon facts. Originally these facts were not presented as evidence in the trial as the jury was presumed to know these facts. Later, the practice grew of bringing in witnesses to provide the jurors information to supplement their own. Originally a jury was a body which was presumed to know all the facts and needed to hear no evidence before it acted, but now the jury is presumed to have no information of its own and to reach its conclusion solely on the basis of information presented before it at trial. The situation when a trial is to the court without a jury is similar.

13. When the matter before the court calls for special knowledge in order to reach a sound conclusion, the procedure of allowing experts to testify has evolved. Originally, a struck jury was used to decide those kinds of issues and later the judge summoned experts to inform him about technical matters. He then could pass information on to the jury. Experts were then used as technical assistants to the court. In a child custody hearing where the trial is to the court, the professional witness serves very much in this capacity today, as a technical assistant to the court providing professional information to the judge to enable him to reach a sound decision based on more than just his personal knowledge of the issue at stake.

14. At the time of your examination make very careful notes. Include verbatim material as need be. It is important to underscore that the hearing or trial may actually be held months or even years after you conducted your evaluation and it is quite embarrassing to get to trial and not remember who was who or who said what. With continuances, delays, etc. one's fantasy that a trial which is supposed to occur one month after your evaluation, may be shattered as you may be called upon to testify, in my experience, six to twenty-five months after the fact.

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